UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA, : 10 CR 268 (DLI)

:

-against- :

United States Courthouse
Brooklyn, New York

SHAUN TAYLOR :
TIMOTHY PINKNEY

July 2, 2014
Defendants. : 10:00 o'clock a.m.

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TRANSCRIPT OF TRIAL
BEFORE THE HONORABLE DORA L. IRIZARRY
UNITED STATES DISTRICT JUDGE, and a jury.

APPEARANCES:

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Proceedings recorded by mechanical stenography, transcript produced by computer-aided transcription.

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(The following occurred in the absence of the jury.)

(The defendant Pinkney is present.)

THE CLERK: Criminal cause for pretrial conference, docket number 10 CR 268, United States versus Shaun Taylor and Timothy Pinkney.

Please state your appearances.

MR. AMATRUDA: Matthew Amatruda and Tali Farhadian for the United States.

Good morning, Your Honor.

THE COURT: Good morning to both of you.

MS. FARHADIAN: Good morning.

MR. HERMAN: Good morning, Judge.

Carl Herman and Paul Rinaldo for Mr. Taylor. Mr. Taylor waived his presence yesterday. He will not be with us today.

THE COURT: Yes. That was with leave of the Court.

MR. RUSSELL: Royce Russell and Richard Jasper for Mr. Pinkney.

THE COURT: Good morning to all of you.

We are here to address the two issues that were raised yesterday in connection with what we are all calling the MDC tape, right? So that we are all on the same page.

I did receive, although it was way after 6:00 o'clock, I did receive the most current transcript of the tape with the proposed redactions highlighted in yellow, and also attached was a transcript -- I'm sorry -- as Attachment B was the portion of the transcript that the parties have some disagreement about in terms of what it says.

I also did get the government's letter indicating that the parties seem to have come to some agreement, and specifically the agreement is with respect to limited words and phrases in eleven instances, I understand. The parties have reached some agreement.

Why don't I start -- why don't we address the wording of the transcript first and then we can talk about the redactions afterward.

Mr. Amatruda, where are you all on this?

MR. AMATRUDA: Your Honor, with Your Honor's permission, if Ms. Farhadian, she is I think more prepared to speak on this.

THE COURT: Sure.

MR. AMATRUDA: I could but I think it may be better. She may be more articulate on it than I am, if that's okay.

THE COURT: Sure.

MS. FARHADIAN: Good morning, Your Honor.

What we discussed last night with defense counsel is that the government proposes to introduce this transcript as an aid to the jury and through Special Agent Thomas McNally's testimony. He would testify that the transcript reflects his understanding of what the recording says. He will certify it as such. He will sign it before we distribute it to the jury.

With that understanding, we agreed to disagree to the extent that we have to because in the end, because it's connected to his testimony, it's really what he hears, not what Mr. Amatruda and I hear or defense counsel hears that controls.

Then, of course, defense counsel can have their own interpretation. They can cross-examine him about it. They can introduce those eleven or more instances where they heard something else.

Given that understanding, we hope that the Court does not have to engage in arbitrating between the differences in what we hear and we can just leave it at that.

THE COURT: Are both sets of defense counsel in agreement with each other? Do one of you want to address this or do each of you have different -- when I say each of you, I mean each set of defense counsel for defendant.

MR. HERMAN: I can address it.

I think we are in agreement, Judge. I think we are in agreement with the government.

What we didn't know until late yesterday was that the -- the government intends to introduce the transcript by way of Agent McNally, which they can do.

THE COURT: Right.

MR. HERMAN: Apparently, as I understand it, they are not going to call the cooperating witness who is on the transcript because we haven't received any 3500 with regard to that witness and as of yesterday we received six new disks of 3500. We have gone over them. I didn't see the name of the cooperating witness there, so maybe I am wrong, but maybe there is more coming, but at this point, on July 2nd, at 10:15, we don't have any 3500 for the cooperating witness.

Moreover, the government has told us that it would be Agent McNally who will testify as to his transcript of the tape and we agree with the government on the case law, that we can cross-examine Agent McNally as to what he heard. We can provide an alternative transcript. We can probably play the tape with Agent McNally on the stand and ultimately the jury has to make a determination of what is being said.

But having said that, there really are very few instances. There is no reason for Your Honor to go into playing the tape and I think that -- that issue can be resolved just the way the government has proposed. So I think we are in substantial agreement that in terms of the differences in the transcripts, it's not an issue that the Court needs to involve itself with at this point.

THE COURT: I did give a lot of thought to this yesterday and this is not the first case that I have had where there have been disagreements about what is said in the transcript. In this case, it is an English language transcript, but it certainly is a bigger problem when you have foreign language transcripts and there can be very nuanced interpretations of what is said.

I do think that the proposed approach is the best way to handle this. I think it is a lot cleaner to handle it this way. This way, the government presents its version, the defense presents its version. Obviously, the defense will be free to play those portions again for the jury so that then the jury can follow along with the defense proposed language in the transcript. In the few cases that I have had where this issue could not be resolved, that is in fact how we did it.

Again, we don't have to deal with the whole foreign language translation but it has gone so far as to even have interpreters testify about why this says this.

Again, I will be giving the jury the instruction, both at the end of the case and at the time that we get to this point, and if there are any other transcripts or recordings that will be played to the jury, I will be giving them an instruction, that the transcript is just an aid, that what is actually in evidence and what the jury is to consider is the tape itself, and that ultimately it is what the jurors themselves hear, not what the witness hears, not what the lawyers hear, but what the jurors themselves hear on that tape that is controlling.

So that in a sense will be the instruction and I try as best as I can, and sometimes things happen really fast during the course of the trial -- I don't need to explain that to all of you, you are all very experienced -- but I do try as best as I can to anticipate issues in a trial. I try to give the attorneys an opportunity to take a look at the limiting instructions that I propose to give to the jury so that I can get input from all of you in advance. I will do that in connection with this as well.

I already have a couple of limiting instructions, such as, for example -- and most of them are consistent with what are already in the -- I forget -- the limiting instructions I generally pull from the final instructions, which is another reason why I like to have those instructions done in advance.

I will go through the proposed wording that both sides have submitted to the Court in connection with the transcripts. For example, there is another limiting instruction that I will have to give, and I have given it in another case, United States versus Boston, where the government also was allowed to introduce -- that was a tape-recorded phone call from the MDC by the defendant in that case to the girlfriend, I believe it was. It is 11 CR 107, is the docket number in connection with that.

I know that I gave a limiting instruction in that case as well because, obviously, the conversation discusses the fact that both Mr. Taylor and Mr. Pinkney are at the MDC so the jury will have to be given an instruction that they are not to draw any kind of adverse inferences against each of the defendants.

The other limiting instructions that I am expecting -- I know I am going off tangent, but just to give you some advanced warning -- is with respect to the accomplice testimony, just the fact that their cases have been disposed of by plea of guilty and that they are not to assume that the defendants are guilty because somebody else pled guilty to the same or similar charges.

Again, I have the parties' proposed language in connection with that. I have a charge that I have given in a number of cases with respect to that.

Prior inconsistent statements, just because that comes up pretty often, so I like to have that ready. There may be one or two that off the top of my head I am not remembering.

Certainly, we can either during a lunch break or early in the morning before we bring the jurors in, if there are issues like this, I would like to meet before I bring the jury in so if there is anything to discuss from a legal perspective or even a more administrative matter, I'd like to meet with the lawyers say at 9:15 or at 9:30, if we are having the jury come at 10:00 o'clock. I like to tell them at 9:30. Even though in this situation they should be here on time, but just trying to take into account everything that could possibly happen. That's just to give you some advanced notice.

I think that this procedure should work and then this gives each side the opportunity to play the tape for the jury and put forth your proposed language. The instruction will be given as a reminder each time.

MR. JASPER: Judge, I think we did speak to the government last night before I put in the letter, and I think the letter does reflect our understanding. I think the way Your Honor has proposed to approach it is definitely the way to go. With respect to giving that limiting instruction, as you said, that it is the tape itself.

THE COURT: Right.

MR. JASPER: That is evidence and I'm sure that Your Honor will emphasize it's what, as you said here today, it's what they hear.

THE COURT: Yes.

MR. JASPER: Not what even the witness on the stand hears and it would be -- obviously, there will be portions of that that will be subject to, I would gather, extensive cross-examination.

THE COURT: Right.

MR. JASPER: Particularly since, as Your Honor pointed out, it is in English.

THE COURT: Right.

MR. JASPER: It's definitely an aid. We know that because the tape is in English.

The one interesting twist on it is that it's coming in through the agent. Of course, they can do that. They can establish the authenticity of it. The agent listened to it and he knows the voices and so forth.

What I see though as being open certainly to cross is the witness' understanding, perhaps, of what actual phrases say, since the government apparently has chosen not to put the informant on the stand. So if we have -- it's a very interesting situation here, which I hope does not trigger, despite the efforts of counsel not to open the door to hearsay as to how the agent understands this.

THE COURT: Mr. Jasper, that's exactly the question that was roaming around in my head as I was listening to

Mr. Herman.

I have gone through more than 80 pages of the revised transcript. I have actually read every line because I wanted to see if I had perhaps other suggestions for redactions or questions about certain sections of it. We will talk about that some more.

But as I read through it myself, there is obviously slang. There is a lot of slang that is in there. And I am not going to tell the government how to prove your case but you may have some limitations as to what Agent McNally may testify to and I've had no motion from the government at this point to have Agent McNally qualified as an expert in any of the street slang or prison terminology. There is a lot of prison terminology.

I can sort of guess just because I have been doing for 35 years pretty much nothing but mostly criminal law and I can certainly surmise. We don't have a jury that necessarily has that same background and experience.

You know, the government is going to try the case however the government is going to want to try the case. Certainly, under -- I know that I gave a schedule for the turning over of 3500 material. I don't know. The government still has the right under the Jencks Act to provide it at a later point in time. I don't know what the status is of that in connection with the cooperating witness.

But --

MS. FARHADIAN: May I address that and a few another points of clarification?

THE COURT: Yes.

MS. FARHADIAN: Let me just start there with what Mr. Jasper brought up.

We are familiar with the Second Circuit case law about this. I believe the leading case is United States versus Mejia, M E J I A. We understand that the agent cannot --

THE COURT: Do you have a citation to that? There are a lot of Mejias.

MS. FARHADIAN: I don't have it in my mind but I can email it around.

But it sounds like Your Honor is also familiar with that case law and we understand that the agent is not an expert in street slang and we do not anticipate questioning him in that way or qualify him as an expert so that we could do that. So our intention has been to be careful.

My understanding is that we can, of course, argue in summations and elsewhere about what we think the terminology means but he will not testify to that. I don't think that there is anything to worry about. We understand what the constraints are.

With regard to the witness who wore the wire, at this moment it is not our intention to call him. We will, of course -- that may change depending on how the case progresses. We would provide his 3500 in turn.

Just, I think everyone understands, but to be clear, it is not his transcript but he could testify. He could offer something different.

THE COURT: It's not his transcript but he's a speaker.

MS. FARHADIAN: Right.

THE COURT: He's a participant in the conversation. In the normal course of most cases that I have presided over and in cases that I prosecuted in 14 years doing narcotics cases, where the cases relied very heavily on consent recordings or wiretap recordings, especially where there are cooperators, it is the normal course to have the cooperator on the stand so that the cooperator can explain what the state of mind of the parties was during the conversation, what the witness understood when he was told X, Y and Z, what was his understanding, provide the context for it.

This is somewhat unusual. Again, it is the government's case. You are bringing the case. It is up to you to try it as you deem fit and it is up to me to decide what is admissible and not admissible. But be forewarned, at this juncture I will not entertain any motion to qualify anyone as an expert because there has been no notice that anyone was going to be introduced as an expert. The defense has not had an opportunity to ask the Court for leave to seek any other experts to contradict. I am foreclosing that at this juncture. I will not entertain any kind of last minute motion to introduce expert testimony.

MS. FARHADIAN: Your Honor, we never intended to ask the Court --

THE COURT: I want to make it clear because during the course of this case, during the history of this case, unless I make it abundantly clear and very plain, everyone seems to have misunderstandings. It turns out then that I have to deal with mountains of motion practice because people had misunderstandings.

I want to make it perfectly clear, that I am not entertaining any kind of motion for the introduction of expert testimony in this case.

MS. FARHADIAN: Finally, Your Honor, with regard to the 3500 material that Mr. Herman referred to, we did turn that over, as we said we would yesterday, on disks to them. I just want to be clear, because Mr. Herman described them as new, that most of the material in there is not new.

The reason the production yesterday was so voluminous was because we thought it would be more convenient for the defendants if we reproduced everything that we produced to date in addition to the quite limited new material that was going to them yesterday. So that is a comprehensive set. But most of that is the material that they had in Mr. Taylor's case since last year.

Likewise, today, the production that would come to the Court in hard copy is cumulative, so it's everything Your Honor had before in addition to the few inclusions and just in order so that you don't have to piece together what's new and what's not new.

(Continued on next page.)

THE COURT: All right. So, we're all set on the use of the transcripts in connection with the tape; correct? We are all set with that. All right.

So then, why don't we address the redactions. I want to be closer as to where -- what my understanding was, where we left it yesterday, because I know there was a lot of discussion back and forth --

MR. AMATRUDA: Sorry, your Honor.

THE COURT: Whenever you are ready, let me know, and I'll continue speaking.

MR. AMATRUDA: I'm sorry, your Honor.

THE COURT: In my day, when the judge spoke, nobody else spoke. Then you wonder why there are misunderstandings and confusions.

My understanding, as we left here yesterday, was that the government is proposing the redactions in the form that I received in the updated transcript yesterday, highlighted in yellow, that defendant Pinkney was in accord with those redactions, and that defendant Taylor wanted the entire tape to be played.

That was my understanding as to where we left it yesterday.

So, am I correct that's what everybody's position was, Mr. Amatruda, that was the government's position, that you were going to submit the redacted form? Of course, if the

Court ruled otherwise, that you would play the whole tape or whatever other portions had to be played?

MR. AMATRUDA: Your Honor, what we were intending to play at trial was the portions of the tape that are not marked and highlighted yellow as proposed redactions to the transcript.

THE COURT: All right.

For Pinkney, you were in accord or in agreement with respect to redactions made by the government; correct?

MR. RUSSELL: Most of it, your Honor.

THE COURT: When you say "Most of it," are there other redactions that you are proposing?

MR. RUSSELL: No, your Honor. Actually, there are redactions that we don't have an issue with coming in, and we can address that with the government. I think it would be a lot quicker just to point those things out to the government, and then resolve that.

There were other --

THE COURT: Why is everybody leaving me out of the loop here? I need to make a decision as to whether or not ultimately, under 404(b), regardless of what the parties think, whether the information, number one, is relevant, and number two, whether, even if it is relevant, whether it is highly inflammatory and unduly prejudicial.

I myself have come up with a couple of places where

I don't know, I have questions, about whether or not it's admissible. We're really late in the game here on this. This is something that should have been done a long time ago. At the minimum, this could have been handled in May, and I had plenty more time in May, as scarce as my time is, I had plenty more time to May to sit down and deal with this in a much more -- in a fashion that isn't as rushed, if you will.

I don't know when the government is planning to play this tape. We are starting on Monday, Friday is a federal holiday, and it's really rather inconsiderate to think that the Court can just spend its 4th of July holiday going over proposed redactions, when this could have been done in May or April.

The defense should have come here prepared today with at -- at least with the pages -- with pages for me to look at, with your proposed redactions or additional redactions or sections that you expect not to redact.

MR. RUSSELL: I have it, your Honor.

THE COURT: That's nice. Did you file something on ECF yesterday? Did you give me a copy of that this morning?

MR. RUSSELL: No.

THE COURT: No.

What is Taylor's position?

MR. HERMAN: Judge, I want to indicate to the Court we have discussed this with our client, with Mr. Taylor.

THE COURT: Right.

MR. HERMAN: He has requested that the entire tape, without any redactions, be played for the jury. We're going to stand by that request. We understand that there may be legal objections which we could interpose, based on your Honor's ruling, that some of the tape is not self-inculpatory of Mr. Pinkney, and under your Honor's ruling, that would be -- under Supreme Court cases, that could be redacted. We could take that position. But given our client's desires and given our own strategic reasons, we would like the entire tape, without redactions, to be played to the jury.

And I gather from the government's last paragraph of their letter last night, the government says they are prepared to introduce the entire recording into evidence, and so we would take them up on that offer, and we would waive any legal objections that we might have to various portions of the tape.

MR. ROYCE: Your Honor, if I may?

THE COURT: Yes.

MR. RUSSELL: To be more clear as to Mr. Pinkney's position in reference to items that we felt should come in: We have those items, and if the Court would like to hear, as to the page and the line, as to what we think should still come in even though it was redacted -- and we have five to six places where we believe that and I can go through the page and line -- and most of the relevance deals with the context of the relationship between all the parties, that being S-Dot or Mr. Taylor, Mr. William Reid, which is Luc, and the interplay of the conversation of the tape, to put it in context in reference to what Mr. Pinkney had to say.

THE COURT: Who is William Reid?

MR. RUSSELL: That is Luc, your Honor.

THE COURT: I know. I'm asking the government.

Who is William Reid?

MR. AMATRUDA: Your Honor, he's the unindicted coconspirator. The scenario that I know the defense is aware of and that we will be presenting evidence on is that William Reid. Mr. Taylor, at a certain point, moved from one location in Bushwick to another. In the process of that, it started a feud between Mr. Pinkney and a group that Mr. Pinkney kind of ran with and Mr. Taylor's new group or group of friends, who included William Reid.

Mr. Taylor and Mr. Reid shot Mr. Pinkney, and that was a subject of motion practice, and your Honor has ruled on that.

And so, what happened was that the individual who was wearing the recording told Mr. Pinkney that he had seen Mr. Reid in the MDC, and that upset Mr. Pinkney, and that was sort of the impetus to a lot of the conversation that followed. So, Mr. Reid's nickname is Luc, and he is referred to both by name by Mr. Pinkney during the tape, and also by his nickname Luc.

THE COURT: All right.

So, let's start with Mr. Pinkney's proposed -- sections that you request be unredacted.

MR. RUSSELL: Yes, your Honor.

From page one all the way to page --

THE COURT: Okay. We have page one, is the cover page.

MR. RUSSELL: Then page two, your Honor.

Page two to page 34.

THE COURT: All the way through to page 34?

MR. RUSSELL: Yes.

THE COURT: On what basis?

MR. RUSSELL: Your Honor, that sets the relationship and that sets the context and that sets, quite frankly, the animosity and the dislike between the parties. That sets the groundwork for other conversations that come up in reference to this particular case.

And we stopped at line ten, because line ten speaks to Mr. Pinkney being a Crip, and it's our understanding that is a redacted portion by the government, and we agree with that portion staying redacted.

MR. AMATRUDA: It's actually line 41 on the transcript, page 33. Lines 41 and 42.

THE COURT: What transcript are you working off of?

MR. RUSSELL: Your Honor, we received a transcript and an errata sheet that was sent from the government in reference to review.

THE COURT: You know what? You are not even working off the same transcript that I read last night, and that I have been going through and poring through carefully this morning. What I got from the government is an updated transcript that incorporates the back-and-forths from defense counsel, which was posted on the docket.

MS. FARHADIAN: Your Honor, we gave defense counsel on Friday night the same document we gave to the Court yesterday.

MR. RUSSELL: That is the same document that I printed and I'm reading from.

THE COURT: So, why is your pagination different?

MS. FARHADIAN: We had this problem even in previous transcripts. In our previous exchanges, when we went back and forth with defense counsel on earlier drafts, sometimes your responses were off by one number. I think it may be a printing or other issue. We understand what you meant about the part from the Crips.

MR. RUSSELL: I'm only printing what I received, to that effect. Even this morning, when I was going over it with learned counsel, we noticed there was some adjustments, as far as lines, concerning pages. I really don't know why.

THE COURT: So, I'm not sure that what I have is what you want. The reference to the Crips go -- as the government says, page 33, line 42.

MR. RUSSELL: That's the sentence. We are in agreement as to the sentence.

THE COURT: It seems to me that those portions of the transcript that the government has proposed to play, to introduce, are sufficient to set up the context and to set up the animosity between the parties.

And frankly, a lot of these conversations contain uncharged crimes that defendant Pinkney was admitting to having committed, including some very graphic descriptions of a scar that he, according to his words -- again, these -- they have not been proven beyond a reasonable doubt, but I'm just going by what he said. All right. So, just for sake of reference, ease of reference. But he talks about cutting Luc in his face, and he wants a really specific description from the witness about that scar, and it is pretty graphic.

And it's clear, from the context of what is admissible or what the government seeks to admit, which relates to the homicide that defendant Taylor allegedly asked defendant Pinkney to commit on his behalf, that this is not the kind of relationship where they are really solid friends, that there is animosity between them, and I really don't think that you need to introduce the kind of inflammatory and prejudicial statements that are made on those pages.

It also includes, for example, on page six -- and there are references about that in other places throughout the transcript -- about how Mr. Pinkney was at both ends of defendant Taylor's gun, meaning that -- I think it's a fair inference to make -- that he could have been both a victim of defendant Taylor and also acting at the behest of defendant Taylor, as is the allegation here. And Pinkney talks about wanting to get back at Luc even further, and it gets more graphic later on in the transcript, about him saying he actually wants to kill him and he wants to get a tool, he wants to position himself somewhere at the facility where he can get a tool, where he can effectuate that.

Page 17, there is a statement that defendant Taylor allegedly killed somebody, and I don't think it relates to any of the charges contained in the indictment, and certainly, if it did, I would assume that the government would want to have that come in.

Page 30 doesn't even have anything to do with Taylor. It's about a separate incident altogether with somebody named Uncle Ra. I think it was in Staten Island. It wasn't even in Brooklyn. Apparently, there was a homicide there.

MR. RUSSELL: We understand the government's position. We are in agreement with that.

THE COURT: If you are in agreement with that, why do you want that in? I don't understand.

MR. RUSSELL: Your Honor, to a certain level as far as what we first thought, was that it in a very detailed manner explained the animosity between the two, and because of that, statements were made based upon looking at only the animosity between the two.

MR. JASPER: Judge, if I may?

THE COURT: Yes.

MR. JASPER: We hear what your Honor is saying about those pages. We can agree to have those redacted.

I just want to explain --

THE COURT: They are already redacted.

MR. JASPER: The issue -- part of the issue, because I think the government knows the theory and can anticipate some of it, just to help the Court put into context, the informant in this case has been given a lot of information about this investigation, which is not a surprise, but he then uses this information and the animosity to get Mr. Pinkney souped up.

There is an enormous amount of anger and rage on this tape, as your Honor no doubt knows. That's one of the big concerns of ours. It's there. We have to deal with it in some way. But this informant is now egging on his knowledge of the dispute between Luc and Taylor, Taylor's purported use of Luc to shoot Mr. Pinkney several times. And so, the thinking was in part just to give your Honor some background as to what the thinking is, because at this point, as I said, I think the parties pretty much understand what the theories are going to be. But I think sometimes in an attempt not to clue the other side in, it sometimes help, obviously, to have the trial Court understand what the thinking is, so that it can at least have some context and not rule in a vacuum.

But we understand what your Honor's position is. I just wanted to just clarify what some of that thinking was on the defense part.

THE COURT: I understand the parties' thoughts, but at the end of the day, it's up to me to decide what evidence should come in and not come in under the Rules of Evidence, based on the case law and based on my obligation to protect the rights of each of these defendants to have a fair trial.

I'm very sensitive to the fact that each side, the government and the defense, has their theories of the case, and that you have your own trial strategy, if you will, and thoughts about how you want to prove certain things.

But I have to tell you, I'm really very, very concerned about this, because the language is very explicit, slang notwithstanding, okay, slang notwithstanding, I think the fact that the witness kind of -- even when -- the witness does keep on asking about the homicide and so on. That's the subject of the trial here. He keeps kind of coming back to it. But what the government seeks to admit also does show the highly charged state in which Pinkney was in.

So, I hear what you are saying. What I am saying is that from my read of this -- again, I have not read it all the way to the end. Before this afternoon is out, I will have read it all through the end. I'm going to take down everything that you all want to propose to unredact. Okay. And I may not give you a final decision right now. I'm telling you right now how I'm seeing it based on what I read, and as you can see, I have taken my own notes about what I have gone through.

But I have real concerns that this may be a little bit much to get at what you want to get at in the way you want to get at it, because I think that, from my read of it, that there is enough of the flavor of the tenseness of the relationship, the animosity. It's the kind of thing that's really -- how can I describe it? It's the kind of relationship that's very volatile; right? Where, from one second to the next, things can change and go one way or the other, and I certainly got a sense of that, even from just the portions that were unredacted.

And certainly, there is also -- it's clear that the witness keeps coming back, right, coming back to the homicide. And I don't know who the handler was. I assume McNally is going to testify about that witness and about how the witness came into this. I assume that the parties are going to ask question, What did you tell the witness to do, the informant to do?, and so on. I'm guessing on what was done in the past in this type of situation, trying to anticipate it.

But let me hear the rest of what you want. As I sit here right now, I'm really not inclined to let that portion come in. But let me hear the rest of what you have to say.

MR. RUSSELL: Well, your Honor, taking what the Court has said, I will elicit the other pages we think, portions, should come in. I hope the Court would use it in the light given what the Court has just said, with that background, what we were trying to bring forth.

We have what I call page 68, lines 15 to 46.

THE COURT: What's the context of it? Maybe you are like a page behind or something.

MR. RUSSELL: It says that by Luc here.

THE COURT: So, that starts, I think, on page 67, line 37.

Am I right, Mr. Amatruda?

MR. AMATRUDA: Yes, line 35, your Honor.

THE COURT: I'm sorry. Line 35, page 67, and then is followed by the witness says "Ha"?

MR. ROYCE: That is correct.

THE COURT: That goes to what?

MR. RUSSELL: Line 46, and the context is "Tell Timmy who are you."

Luc said: "Let me see. Yeah."

MR. AMATRUDA: That's page 68, starting at line 17. Page 68 starting at line 17.

THE COURT: And you wanted to end where?

MR. RUSSELL: And --

THE COURT: To the end of what the witness says there, that paragraph?

MR. ROYCE: Correct.

THE COURT: That would be up to line?

MR. AMATRUDA: 21, your Honor.

THE COURT: 21. Thank you.

Again, I have the same reservation about that.

Let me hear what your other --

MR. RUSSELL: I think the Court's reservation might be throughout. I'll continue.

THE COURT: All right.

MR. RUSSELL: So then, we go to page 69, line 16, and the context was "S was like." The conversation continues: "S was like."

THE COURT: That continues on the same page 68, so that where you end on line 21. The next thing is Mr. Pinkney laughing, and then the witness: "S was like"?

MR. RUSSELL: Right; correct.

THE COURT: And that continues to what?

MR. ROYCE: It ends at --

THE COURT: On the transcript that the Court has -- hold on one second, please.

(Pause.)

THE COURT: You didn't put this on the docket, this transcript?

MS. FARHADIAN: I did not.

THE COURT: Why not?

MS. FARHADIAN: Because they had a copy, and I wasn't sure I should put this on the public docket. I apologize. We did e-mail what we thought was the exact same document to them.

(Continued on next page.)

(CONTINUING)

THE COURT: Page 68 line 25.

Well, we're going to go by what was given to the Court and I suppose the problem is that I can't docket. You will need to send a .pdf to my deputy because when we scan it, we don't have a way to scan it in color to see the highlights well.

MS. FARHADIAN: Okay.

THE COURT: So, if you send it by .pdf, then we can file it under seal but with restricted access, so this way only the attorneys on the case will have access to it and the general public won't have access to it. Hopefully, this way we have the one that the Court is working from which will be on the docket.

MS. FARHADIAN: Yes, Your Honor.

THE COURT: This way the lawyers can have that as well, so it will work the same way.

So, what you sent to the lawyers was in Word, is that why maybe the pagination is different?

MR. RUSSELL: It was in Word.

THE COURT: So, usually you can correct this problem by sending it by .pdf, it seems to me, so that everybody is on the same page. It probably should have been sent both in Word and .pdf and you should all be ashamed that an old lady like me is giving you instructions on how to send documents.

Anyway, let's get back to the task at hand. So, page 68 line 25, where do you want to go to, Mr. Russell?

MR. RUSSELL: I'm sorry?

THE COURT: Where does that end?

MR. RUSSELL: I believe it ends at the word room.

THE COURT: Okay, so up to line 34.

Is it the whole paragraph? Because there are two places where it sort of ends; there is that whole paragraph and then there is a response from Mr. Pinkney.

MR. RUSSELL: We stop at the word room because the rest is about where is the TV and the TV's in the room.

THE COURT: So, in that paragraph where the witness is talking.

MR. RUSSELL: Right.

THE COURT: So that will be line 34.

What is next?

MR. RUSSELL: Then we go to page -- well, our page 79 and let me just go to where it... It starts with he grew. He grew. And he's describing.

THE COURT: Okay. So that is, on the transcript I have, that would be on page 78 line 22, and going to where?

MR. RUSSELL: Your Honor, we take that --

THE COURT: Wait a minute, I'm sorry, line 17. He grew, he grew, you say he a little bit taller than you.

Is that where you start?

MR. RUSSELL: That is correct.

THE COURT: Okay, my mistake, that is line 17 and going up to where?

MR. RUSSELL: Your Honor, we take that up to page, which is our page 80, the last line is I got hit three times man and you all killers.

And that's describing the shooting of Mr. Pinkney.

MR. AMATRUDA: That's page 80 up to line 11. We redacted all but the last part of that paragraph.

THE COURT: All right, so that will be up to page 80 line 11.

MR. RUSSELL: And it's just one more, Your Honor, one page, I just need to grab it.

THE COURT: Okay.

MR. RUSSELL: Actually, that's it.

THE COURT: That's it. Okay.

So, I will consider this and I will let the parties know. I can post something by tomorrow on ECF so that you will know.

On my transcript page 22 lines 33 to 47, so that is part of what the Government proposes to redact, beginning with the line -- for you it may be on page 23 because you seem to be a page ahead -- beginning where Mr. Pinkney says I wasn't really his gunman, I wasn't his gunman, like I was running around, that was the only thing I ever did for him.

Meaning, I think, Mr. Taylor.

I never bust my gun for him, that was the only one time, that one killing, right?

Then Mr. Pinkney says yeah, I was usually beefing with niggers he was fucking with before that, like Little Ross going on, yeah, I was gunning at them niggers, so for him to be, you know, my workman that.

But just going up to line 47 and maybe we don't even need to go that far.

I want to hear from the Government and the parties about that one because I have different thoughts about that. On the one hand that is, I think, I reference to the homicide that Mr. Pinkney is charged with.

I think he is only charged with the one homicide in this case; correct?

MR. AMATRUDA: Yes.

MS. FARHADIAN: Yes.

THE COURT: And so it is relevant and it also, to a certain degree, it's not completely exculpating of Defendant Taylor but by the same token, it does speak to the fact that Defendant Pinkney was not really acting as a gunman for Taylor. It is a double-edged sword either way you cut it for either defendant, because in some ways it has a little bit that is sort of -- I'm trying to find the right word -- that is sort of, it's not quite exculpatory, but by the same token it is sort of softens the blow, if you will, to a certain degree.

I think this was not raised -- was this raised?

This was included in that original portion that Defendant Pinkney wanted to un-redact and Defendant Taylor is looking to un-redact everything.

MR. HERMAN: Yes.

MR. RINALDO: Yes.

THE COURT: So, unless the Government has a different interpretation, I may very well grant it. I want to think about it some more because it is a really bizarre sort of situation.

MR. AMATRUDA: Your Honor, I think that our thinking on this, the standard rule is that a party's admissions are admissible, but self-serving statements are not. Those constitute hearsay and that it's sort of a very standard sort of legal principle and here, I think that Pinkney's self-serving statements minimizing the extent of his conduct with Taylor are hearsay and therefore, inadmissible.

THE COURT: Does Defense Counsel want to be heard?

MR. RINALDO: Judge, let me just put a point on our position in this as far as this wanting the entire transcript.

You are correct, absolutely, some of these thing cut both ways, but the animosity part of this is crucial to our Defense. Our Defense that this animosity is essentially what led Pinkney to falsely implicate Mr. Taylor in this homicide and that is the basis of it, so we need that in there and we need it as full-blown as possible, notwithstanding the double-edged sword that that might present.

Secondly, Judge, I think the Government is right in one sense; that these are admissions of Mr. Pinkney, they are statements against his penal interest. They come in. Our position is that they can all come in. I thought the Government agreed that they could come in since they're willing to play the entire tape if the Court allowed them to do that.

I don't know -- I had discussed this with the Government, I also discussed it with co-counsel -- I don't know that Mr. Pinkney has standing to raise anything about a 404(b) issue. It's not 404(b). It may be uncharged conduct, but that's not how it's coming in. The Government is not introducing uncharged conduct and giving the basis to get it in. No. It may be uncharged conduct, but it is admissions and statements against Mr. Pinkney's penal interests and they are admissible.

Now, if there are some self-serving statements that need to be redacted, certainly they could be redacted where he indicates his innocence or I don't even see how they're hearsay, they are his own statements. So, that's our legal position, anyway; that this comes in, it is an admission and we want to play the whole tape.

Now, that having been said, if the Court rules against us and decides that the only playing of the tape will be this redacted version, then we would move for a severance so that we would be able to play the entire tape on our case at our trial to show the jury the animosity in its fullest extent and to make the argument that Mr. Taylor was falsely implicated.

THE COURT: And I am not going to grant that motion.

MR. RINALDO: That's our position, Judge.

THE COURT: Pinkney?

MR. RUSSELL: Your Honor had pointed out earlier how this paragraph or paragraphs cuts both ways and our looking at it was his statements. Although, as the Court says, it is not necessarily exculpatory, lends itself to that type of reading.

And number two, when you go further into the conversation, it really highlights the animosity element that the Court had spoken to earlier.

THE COURT: All right. I am going to reserve on that, but I did want to raise that in particular with the parties.

Also, if I can draw the parties' attention to what I have as page 58, maybe on your copy it is 59, lines 5 to 13. It says: Ain't got no body, only one that got bodies is Luc. He ain't never killed a man in his life, I don't think even hit, and he's over here fronting.

And then the rest of that conversation the Government is going to introduce, which gives more context to that portion which the Government seeks to redact. It is not self-serving as to Mr. Pinkney.

MR. AMATRUDA: It's also our position that it's also not an admission as to Mr. Pinkney. In essence, it is Mr. Pinkney's testimony about what Shaun Taylor did or didn't do in his past.

THE COURT: In the context of res gestae, isn't it? Right? Or at least in the context of how he was conducting himself as far as his criminal business is concerned.

MR. AMATRUDA: Right.

Well, Mr. Pinkney's statements are admissible as to both defendants because they are inculpatory as to both of them.

What we redacted from the tape were statements where Mr. Pinkney was discussing, really, conduct by Mr. Taylor that Mr. Pinkney wasn't involved in where Mr. Pinkney, instead of making admissions about things that he and Mr. Taylor did together is instead acting as, essentially, a witness against or in favor of Mr. Taylor. That's sort of the dividing line of our view of what is admissible and inadmissible. That is why we redacted the portions of the tape where Mr. Pinkney referred to being shot by Mr. Taylor because, in essence, in that instance, he is almost acting as a complaining witness again Mr. Taylor.

In the same regard, his observations about Mr. Taylor's history or what it is that he sort of knew about him, we submit are hearsay statements and therefore, inadmissible.

MR. RINALDO: Well, Judge, if I may, it's still a statement. I believe it's still a statement of Mr. Pinkney against his penal interest and as such, it should come in.

We have, from Mr. Taylor's point of view, we have argument that if it's not self-inculpatory, we should keep it out and even out the reference to Taylor, but we are waiving that objection. And it's relevant in the context of what's going on here.

THE COURT: Mr. Russell.

MR. RUSSELL: Yes, Your Honor.

Our position was is that it was redacted and we thought it was, it doesn't really lend itself to the context of the relationship between Mr. Taylor and Mr. Pinkney because it didn't highlight a relationship and it didn't highlight conduct of Mr. Pinkney. We had no real position as to it being redacted or part of the transmission.

MR. RINALDO: Judge, again you read the whole thing up to the end of that statement where he says come on, he over here fronting man.

It also continues to make the point of animosity and that is what's crucial to us as well.

MR. RUSSELL: We have no objection to it coming in. I mean...

THE COURT: Okay, you are confusing me because on the one hand you are making arguments against its introduction and somewhat in support of what the Government is saying, but now you are saying you have no objection to it coming in.

I need to know what your position is.

MR. RUSSELL: Your Honor, we have no objection to it coming in.

THE COURT: Okay, I am going to reserve on that, and I am going to reserve on the applications and consider it some more. As I said, I also do not want to rule on it until I have read through the entire transcript line by line. There may be portions I want to go over again.

If I feel that I need some more input from the parties, we will set aside -- this is not going to be introduced right away; am I correct?

MR. AMATRUDA: At the earliest, it would be the end of the first week of trial, but my feeling, honestly, Judge, is that it may be towards the, in the second week.

THE COURT: All right, well, I am not looking at waiting that long. If I need additional input from the parties, it is something you should be prepared to address

Monday evening after we dismiss the jury for the day.

MR. AMATRUDA: Okay, thank you, Judge.

THE COURT: So a couple of housekeeping issues if there is nothing else on this. A couple of housekeeping things and then we will be done with this conference.

I just wanted to put on the record, because I discussed it with all of the parties, the Government and the Defense yesterday once the reporter was gone, about a procedure for jurors having access to their cell phones.

As I mentioned in the terrorism cases that I tried, we allowed the jurors to keep their cell phones with the understanding that they were not to bring them in to the courtroom; that they would be turned off and left in the jury room, which is what we did. We put them in a basket in the jury room so that they could have access to it during the breaks and during lunchtime and also, of course, with the strong admonition that they are not to do research or talk to anybody about the case and obviously, if we were to find out that they violated that, then they would have to turn in their cell phones. And they are not going to be released during lunch.

We had no problems with it at all in either one of the two JFK trials. The jurors were very happy to be able to communicate with their families, especially those people who had elderly people or children that they were caring for, and

I will make it very clear to them that if they do violate that, that the phones will be taken away and we will consider other sanctions as well.

So, if the parties are agreeable to that, we could follow that procedure. I think the jurors will feel a little bit more comfortable.

MS. FARHADIAN: As we said yesterday, Your Honor, we think that is a great idea.

MR. JASPER: We agree also, Your Honor.

MR. RINALDO: Yes, Judge.

THE COURT: Okay.

Also, with respect to the Government's motion in limine that they filed last week, we received a response from Pinkney but we have not received a response from Taylor. The response was due July 1st.

MR. RINALDO: I'm sorry, Judge, we join in the response by Mr. Jasper.

THE COURT: Okay.

MR. RINALDO: I'm sorry, Judge, we should have made that crystal clear to you. I think Mr. Jasper was working very late into the night that night to get that response out. Normally I would just asked him to mark it as a joint submission.

THE COURT: Okay.

MR. RINALDO: Thank you.

THE COURT: I just wanted to be clear about that.

Also, as a scheduling matter, on Tuesday, July 8th in the morning, I have my STAR Program and it is really hard for me to move that. I think we are going to start at 1:00 o'clock that day. So, just for your scheduling purposes, for witnesses and so on, we will get started at 1:00 o'clock and I will make sure that the jurors are aware of that Monday evening.

MS. FARHADIAN: Thank you.

THE COURT: Is there anything we needed to raise before Monday?

MR. RINALDO: Judge, since we're starting Monday -- and this isn't particularly your concern, but -- I was wondering if the Government would give us some sense of what witnesses we could expect.

THE COURT: I think that is fair enough.

MR. RINALDO: Monday and Tuesday perhaps.

THE COURT: We have gone beyond the point of holding everything close to the vest.

MR. HERMAN: Thank you.

THE COURT: So, proposed witnesses for Monday?

MS. FARHADIAN: At this point, I believe we intend to start with Officer Mia Farina -- F-A-R-I-N-A.

THE COURT: Okay.

MS. FARHADIAN: Dan Mulvanerty.

THE COURT: Would you spell that.

MS. FARHADIAN: First name Dan -- D-A-N. Last name Mulvanerty -- M-U-L-V-A-N-E-R-T-Y.

I believe the next is, the first name is Frede, with an E, and the last name is Frederic -- F-R-E-D-E-R-I-C.

MR. HERMAN: The medical examiner.

MS. FARHADIAN: Yes. I'm not sure we'll get father than that on Monday, given that we are opening.

THE COURT: Right.

MS. FARHADIAN: And then going into Tuesday, forgive me.

THE COURT: How long do you expect your openings to be?

MR. AMATRUDA: Five, ten minutes. Ten minutes, 15 minutes.

THE COURT: Did the Defense want to open?

MR. RINALDO: We're going to open, Judge, yes.

MR. RUSSELL: Yes.

MR. RINALDO: It won't be long, just speaking for myself.

MR. RUSSELL: He did a good job speaking, for opening.

THE COURT: Okay. My preliminary instructions are not that long, so you've got to make sure that you have enough witnesses to go through.

MS. FARHADIAN: Yes, they're here, I'm just trying to be realistic.

I believe after that, we will turn to Tyler Briggs and I believe that that will take some time.

THE COURT: Okay. That is B-R-I-G-G-S?

MS. FARHADIAN: Yes, ma'am.

THE COURT: Okay.

MR. HERMAN: Thank you.

THE COURT: All right.

MR. RINALDO: And if it changes, just send us an E-mail.

MR. HERMAN: Thank you.

MR. RINALDO: If you decide to tell us further with the list.

THE COURT: Okay, anything else?

ALL: No, thank you.

THE COURT: All right, thank you.

Marshals, you can take charge.

(Matter adjourned to Monday, July 7th at 9:30 a.m.)

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